

## Ask the experts

*Sarah Scala takes a closer look at the role of an expert witness in a professional negligence claim.*

When there is a professional negligence claim, there will often be a need for an expert witness. The purpose of this article is to assist accountants and other professionals in understanding when a claim for professional negligence can be brought against them and to explain the role of an expert witness.

If a claim of professional negligence is made against an adviser and the adviser intends to defend that claim, it is usual for the adviser to appoint legal representation. The appointed lawyer may recommend the appointment of an expert witness and it is common for the legal teams of the claimant and the defendant to each appoint their own expert.

Sometimes, often in smaller claims, a Single Joint Expert (SJE) will be appointed to reduce costs and increase the efficiency of expert testimony. The SJE is appointed jointly by the parties (not by the Court) although the Court may direct that evidence on an issue is to be given by an SJE. The default position is that fees are split 50:50 by the parties.

Once appointed, an expert witness's duty is to the Court and that duty overrides any obligation to the person instructing or paying them. The expert is to help the Court achieve its overriding objective by giving an opinion which is objective and unbiased on matters within their area of expertise.

Expert witness work is interesting, challenging and fulfilling. The services of an expert witness can include: the provision of an expert's report, answering questions in writing, attendance at meetings and attendance at Court.

The terms of the appointment of an expert should be agreed at the outset. At this early stage it is important for the instructing party to be clear what it is they are asking the expert to do, and be aware of the restrictions upon the expert. A commitment to give evidence in Court is usually required at the beginning of an expert witness assignment. This can be a daunting prospect and an expert must be able to withstand criticism as the Judge will say exactly what they think. That said, if an expert is honest, can keep their cool under pressure and has followed the rules, they have nothing to fear.

### **A claim for professional negligence**

Negligence is sometimes referred to as a breach of a "duty of care to your neighbour" where the "neighbour" is someone who in your reasonable foresight could have been damaged. Negligence may have occurred where:

1. A duty of care was owed; and
2. there was a failure to take proper care
3. as a result of that failure to take proper care, the duty was breached and loss was caused as a result.

For a valid claim, one needs to demonstrate that loss or damage was suffered directly from the act of failure to take proper care.

A professional adviser should know what they are accused of and by whom and "he who asserts must prove" meaning that, in a civil case, the claimant must prove their case on the balance of probabilities. Then, if the defence asserts something else, they must prove it.

As a tax dispute resolution specialist, I am typically instructed when planning implemented by a professional adviser has been challenged by HMRC. Sometimes, the same professional adviser has handled the subsequent HMRC enquiry too.

The claimant might allege:

- that the tax planning proposed was unsuitable; or
- it was not implemented correctly; or

- that the adviser's handling of a subsequent HMRC enquiry or challenge was poor; or
- all three of the above!

I am also sometimes asked to quantify the loss suffered which is often not a straightforward computation, particularly if the HMRC investigation has not yet concluded.

For example, in cases involving tax avoidance arrangements, a typical instruction would include:

1. Quantifying the tax liability following implementation of the tax avoidance arrangement and the subsequent challenge from HMRC; and

the tax the taxpayer would have been liable for if the arrangement had not been implemented; and

the tax liability that would have resulted if an alternative tax planning arrangement available at that time had been implemented.

2. Opining on what the attitudes were towards such tax avoidance arrangements at the time.
3. Aside from the differences in possible tax liabilities, what other losses were suffered, for example, lost opportunities to make alternative investments, interest on overdue tax and possibly penalties.

The handling of the tax enquiry and whether it met the standard of a reasonable competent adviser, and the point at which the breach of contract or damage arose as this affects whether the claim is time barred.

### **The work of an expert witness**

As an expert witness, I can be instructed by either the lawyers of the claimant or the lawyers of the defendant.

Instructions typically include asking whether there was a breach of duty on the part of the professional adviser with regard to the advice given, and I am often asked to opine on the tax technical aspects of the arrangements in question and to draw upon my experience of HMRC and how they would have perceived such planning at various dates. I am sometimes asked to calculate the position the taxpayer would be in had competent tax planning advice been provided.

The standard is "what would a body of reasonably competent accountants (or tax advisers, if applicable) have done in the same situation and was this type of damage foreseeable?" Note, that there is no requirement to have got it right.

An expert witness should always be provided with a copy of the Court bundle, and I read the bundle in its entirety as a starting point to any instruction. The bundle is the only documentation to which the expert can refer when they take to the stand to give evidence, therefore familiarity with it as early in the process as possible makes for an easier time in Court. The expert will use the bundle and apply their wider knowledge, for example, of HMRC's approaches and 'Spotlights', when giving evidence. Documentation usually included within the bundle in a case of this type includes:

- all accounts and tax returns;
- all correspondence between the advisers and the taxpayer;
- all correspondence between HMRC and the taxpayer;
- internal communications between the professional advisers.

Having considered my instructions and after reviewing the bundle I will start work on the expert report and will stay in touch with the instructing lawyers throughout the process so that I am always up to date with the key deadlines.

### **Important considerations for an expert witness**

An expert witness is a bit player in the process. They are an opinion giver, not a decision maker which feels very different to the capacity in which we offer our other specialist services such as leading the handling of a large and complex HMRC enquiry, where all eyes look to us to provide the strategy on a case.

Part 35 of the Civil Procedure Rules details what an expert witness can and cannot do and failure to follow these rules could lead to disqualification of the expert witness. For example, an expert witness can ask for documents, but they should not go looking for them because it blurs the line between Investigator and expert and they could disqualify themselves as an expert witness.

In a 1993 shipping case known as *The Ikarian Reefer*, Mr Justice Cresswell set out what is regarded as the classic statement of the duties and responsibilities of expert witnesses. These principles have been endorsed by the Courts in other cases and are largely reflected in the Civil Procedure Rules. These principles, which offer protection to expert witnesses, are as follows:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

This means that experts have a duty to the Court on matters within their expertise and that duty overrides any duty to the person from whom they have received their instructions or by whom they are paid.

2. An expert witness should provide independent assistance to the Court, by way of objective, unbiased opinion in relation to matters within their expertise. An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his/her opinion is based. He/she should not omit to consider material facts which could detract from his/her concluded opinion.
4. An expert should make it clear when a particular question falls outside his/her expertise.
5. If an expert's opinion is not properly researched because insufficient data is available, then this must be stated with an indication that the opinion is no more than provisional.
6. If, after the exchange of reports, an expert witness changes his/her view on a material matter, having read the other side's expert report or for any other reason, such a change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans calculations, analyses, measurements, survey reports or other similar documents these must be provided to the opposite party at the same time as the exchange of reports.
8. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the Judge.
9. The expert should cooperate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should cooperate with the other expert(s) in attending without prejudice meetings as necessary and in seeking to find areas of agreement and to precisely define areas of disagreement to be set out in the joint statement of experts ordered by the Court.

## **Summary**

Expert witnesses are brought into Court to give an in-depth testimony to the subject in question and can be a vital asset particularly when the legal team does not have inherent knowledge of the tax issue on which the claim is focused.

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